United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-1559

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT MICHAELSON,

Appellant.

On Appeal From The United States District
Court For the Southern District of New York

REPLY BRIEF

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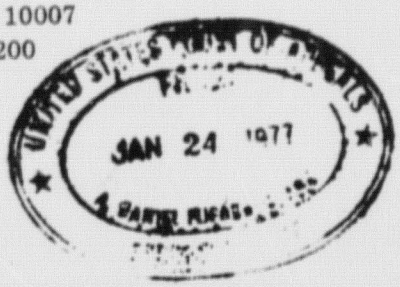

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

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PRELIMINARY STATEMENT

This brief is presented by Appellant in response to the Government's brief in opposition. *

I
THE DENIAL OF APPELLANT'S MOTION UNDER FRCrP 32(d) WAS IMPROPER

A

THE GOVERNMENT CANNOT NOW, ON APPEAL, ASSERT PREJUDICE

The Government's argument, that retrying the appellant would cause "very obvious and substantial prejudice" (Br.

* "Br" (Government's Brief), "Tr" (Transcript), "A" (Appendix).

at 5), is neither factually supported nor properly raised on appeal.

Prejudice to the Government must, in terms of a motion under 32(d) be raised below, at the District Court level. *Neely v. Pennsylvania*, 411 US 954, 959 (1973). Further, even were one to grant that an allegation of prejudice *had* (which it hadn't [A50-53]) been made below, the prejudice, to defeat the motion to withdraw, would have to be such that it crippled the Government's ability to maintain a prosecution. *Id.* There has been no such showing in the case at bar, nor could there be. The Government had, and continues to have, sole dominion and control over all the witnesses in this case (who, *en passem*, are all either Government agents, cooperating co-conspirators, or sentenced defendants.) The argument of the Government as to prejudice fails to cope with the mandated showing for pre-sentence withdrawals of plea, to wit, "substantial prejudice". *United States v. Stayton*, 408 F2d. 559, 561 (3rd Cir., 1969).

The Supreme Court would seem to take issue with the Government's thesis that appellant, to have prevailed below, would have to show a "substantial reason" (Br at 7) for his actions in desiring to now go to trial on the issues. In *Kercheval v. United States* [274 US 220, 71 L.Ed. 1009, 47 S.Ct. 582 (1927)] the Court felt that presentence withdrawal should be granted "if for any reason the granting of the privilege seems fair and just." 274 U.S. at 224; *accord. ABA Standards Relating to Pleas of Guilty*, §2.1(b). If the Court below utilized a stricter standard, *e.g.* "manifest injustice", then its decision on Appellant's Motion would have been an abuse of discretion calling for appellate reversal.

Appellant is at a loss to explain the footnote (Br. at Page 7) which would seem to indicate that the Government believes that defendant's defense was "directly contrary to the representations he made at the time of his plea." Even a reading of the transcript of the taking of the plea most

favorable to the prosecution, would show that appellant's relation of the facts of the case is entirely consistent with his continued claim of entrapment and coercion.

The Government (Br at Page 8) speaks of the trial of appellant's co-defendants as if he himself were one of those who had been tried. Just as much as this is not the true way of things in this case is the implication that appellant pled in the midst of a full-blown and much involved trial. Rather, the facts show that the appellant never had any witnesses testify against him at the time he took the plea. Furthermore, all that had occurred in the trial was the opening statement of the United States Attorney,* which, without doubt, cannot be considered evidentiary in nature. Nor, in the context of this case, can the opening of the prosecution be considered revelatory. The theory of the Prosecution was clear and all parties had been provided with tape recordings made by Government agents and/or cooperating individuals** which, it is offered, provided as much a structure for discerning the prosecution's opening statement as the opening statement itself. Nowhere has the Government claimed that the taking of the plea of guilty by the appellant in any way lessened the surprise and impact, or strategy and tactics, of the Prosecution forces in this case. The Government here had no "on-going" trial but one merely in the most naissant stages. It remains, that not a single witness had been called at the time the appellant took his plea.

On a purely logical basis, the Government appears to be in the quandary which is produced when it attempts to view the trial as prejudicial to itself but cannot, conversely, argue that it was prejudicial to the appellant. In terms of Double Jeopardy, it is clear that no jeopardy could have

* Plea negotiations were going on during the time of the opening. Appellant was given time following the opening to consider pleading guilty.

** It is to be noted that the Government never revealed to the appellant that the key co-operating figure "Stagg" was truly a thug when then an actual agent.

attached in appellant's trial for no witness was ever sworn against him. *United States Constitution*, Amendment 5; *cf.* Constitution of the State of New York, Article 1 Section 6; *People v. Jackson*, 20 N.Y. 2d, 440, 285 N.Y. Supp. 2d 8, 231 N.E. 2d, 722 (1967) cert. den. 391 U.S. 928, 88 S.Ct. 1815, 20 L.Ed. 2d 688. [Construing New York CPL §40.30 (1)(b)]. How the appellant cannot be in jeopardy but the Government *can* be in jeopardy is beyond even the most fertile legal imagination.

Lastly, within this area, for the Government to argue that the case at bar is in any way analogous to *United States v. Barker*, supra, is disingenuous. Here, there were not "far-flung witnesses" nor was this, in terms of evidence, "a complex case" for the Government. Additionally, the Government has never alleged that the Court would in any way be inconvenienced by allowing appellant to try his case before a jury of his peers.

The Government's case in the trial being discussed was not lengthy and it is doubtful whether "expense" is a valid criteria in terms of the rights of a defendant under the Federal Rules and the Constitution. In passing, there is great social reasoning in allowing appellant to publicly air his well-grounded claims of coercion, entrapment and Governmental misconduct.

B

THE GOVERNMENT BREACHED ITS PLEA BARGAIN AGREEMENT

Clarification is needed as to the footnote appearing at the bottom of the Government's Brief at page 10. The Government neglects to include an essential fact: that at the time the sentencing judge first saw the pre-sentencing report, appellant was termed as the *most* culpable of his co-defendants. Only after the Government was notified and became aware that the appellant took issue with this

statement and further was considering a withdrawal of plea as a remedy to the violation of this plea bargain did it issue the correction which appears below. [A-52] There is support for the argument which reads that once the damage is done, it is done for all times. The Government's belated correction had become a nullity.* *See, United States v. Robin,* ——F2d—— (Slip Op 951, 10/15/76) [Government's contention that the sentencing judge limited her use of the prejudicial report was rejected.]

Once again, on appeal this time, the Government attempts to convince a Court that stating that someone is "*the* most culpable" of his co-defendants is not tantamount to taking a view as to his sentencing. This flies in the face of both the common and legal meaning of words. "Culpable", derived from the Latin "culpabilis", is defined as meaning "blameable; censurable". Moreover, " 'Culpable' in fact connotes fault rather than guilt." *Black's Law Dictionary* (4th Ed.) at 454. The most rudimentary of laymen's dictionaries would bear out the appellant's contention that to assess culpability is *not* merely relating the facts of a case. "Culpability" is, by its very nature, a value judgment and a subjective assessment of the facts of the case. It is *not* one of the facts in the case itself. Combined with the use of other characterizing words in the pre-sentencing report, the term "most culpable" rang true as the opinion of the Government attorney [who spoke to the probation office] as to who within the scheme of the conspiracy should get the heaviest sentence.** It is not, nor can any wealth of

* Especially as evidenced by the appellant's maximum sentence.

** The further importance of this fact is that the trial judge had expressed the feeling that he couldn't sentence the defendants until all of the probation reports of the defendants were completed. November 5, 1976. At this stage of the proceeding at least four other defendants reports had been completed—but the Judge said he wouldn't sentence the defendants until he saw all the probation reports. He indicated that the reports he had seen had each defendant blaming one another *and* at that point, he had put the reports together and likened it to doing a jigsaw puzzle with one piece left over. Therefore, the sentencing was adjourned until two remaining reports were completed. NOTE: Michaelson's sentencing report had not been completed yet.

argument make it, a purely objective statement of the facts of the case.

The Government's reliance on *United States v. Needles* [471 F.2d 652 (2d Cir., 1973)] is misplaced within the facts of this case. In *Needles*, the absolute *bona fides* of the defendant was in question, for the motion there to allow withdrawal of the plea of guilty was made at the very time of sentencing after a brief adjournment had allowed the defendant to read his presentence report. On the basis of the pre-sentence report, *and that pre-sentence report alone*, the motion to withdraw was made. However, in appellant's case, the pre-sentence report, was violative of the plea bargain agreement, was not the sole rationale for withdrawal. Furthermore, the Court was put on notice prior to the sentencing, that additional factors were weighing in the balance (A29-30). The next day (November 19, 1976) the appellant himself swore to a 19 point affidavit in which he laid out to the Court numerous factors involved with his desire to withdraw his plea of guilty, all of which, indicated that the pre-sentence report was merely the straw which broke the camel's back. (A33-38). This is consistent with the Government's discussion (Br at 12, footnote), of the situation where "[a] defendant is *merely* attempting to avoid the imposition of a stricter sentence than he had originally expected to receive at the time he pleaded guilty."* (Br. at 12, footnote .) [Emphasis supplied].

Finally, within this point, appellant finds it necessary to reiterate that F.R.Cr. P. Rule 32 recognizes *only* two factual distinctions which were cognizable to the District Court in deciding the motion, to wit, *pre*-sentencing and *post*-sentencing withdrawals of a plea of guilty. There is no, and, it is submitted, that it would be an abuse of discretion for the Court to construe, an additional distinction of "pre-*trial* of co-defendants" and "post-*trial* of co-defendants" as the Government suggests and implies exists.

* Defendant had not yet been sentenced, but did allege as one of his many points, the Government's breach of contract.

C

THE GOVERNMENT CONTINUES TO OPPOSE, AND DEFEND THE FAILURE TO TURN OVER ARGUABLY BRADY MATERIAL

The *Brady* issue in this case, cannot be dealt with as cavalierly as the Government attempts to do in a footnote to their opposing brief. (Br. at 12, footnote **). To describe the appellant's contention that the *Brady* material "would have proven the Government's informer, Tony Stagg, to be 'a vicious, ruthless gangster' who had been previously 'accused of entrapping people' " (Br. at 12, footnote **), as "baseless" is to beg the question. For whether it is baseless or whether it is well-founded was a question for the trial court to decide. The material in question was never referred to the trial court for any sort of *in camera* screening. For the Government to make an *ex parte* decision that the material was "3500" material rather than *Brady* material is to usurp the duties of the trial court judge under the rationale of both *Brady* and *Giles*. It was the duty of the court below, when faced with the allegation that this material was not turned over to the appellant, to request, at the very least, to see the material in question. The Government's refusal to even proffer the material to the Court, and thereby counter any suggestion that the refusal to disclose was a denigration of appellant's rights, squarely places the burden of this secrecy upon the Government's shoulders. The Court below was never made privy to the *Brady* information and, therefore, could make no reasoned decision that the material in question was either useless or "3500". Moreover, since the appellant plead guilty, had the material been, as the Government suggests, "3500" material, it would have never come to light at all. If it now turns out that the material in question was indeed *Brady* material, it further logically follows that the plea taken by the appellant was not voluntary and

knowing in the Constitutional sense of that term. For the Government to argue that appellant's defense of entrapment and coercion was, on its face, meaningless and just a reaction to a disagreeable pre-sentencing report, and then to defend the practice of keeping from appellant the very material which, on its face, appears to support at the very least a reasonable doubt as to his guilt when viewed in conjunction with his claim of coercion and entrapment, is unjust. In addition, it must be noted, that the fact pattern of the *United States v. Giuliano* [348 F.2d. 217 (2d Cir., cert. den. *sub nom. Prezioso v. United States*, 382 U.S. 939, 86 S. Ct. 390, 15 L.Ed. 349 and 382 U.S. 946, 86 S. Ct. 406, 15 L.Ed. 2d 354, reh. den. 382 U.S. 1000, 86 S.Ct. 535, 15 L.Ed. 2d. 490. (1965)] is so completely opposite to the fact pattern of the case at bar that it is of little worth to even examine it. Suffice to say, that the defendant who raised the issues analogous to the ones in this case had in fact testified at the trial of his co-defendants and was seeking not the secreted material here, but the notes of a Government agent which are within the purview of 3500. Just as dissimilar is the fact that this defendant had full knowledge of the issues involved when he took the plea. Quite unlike this case, where the appellant was completely in the dark as to the true nature and character of the individuals involved. Once again, unlike *Giuliano*, the plea here was not knowing but was rather "the result of fear, fraud [and] . . . ignorance." *Giuliano, supra* at 222 citing *Kercheval v. United States*, 274 U.S. 220, 71 L.Ed. 1009, 47 S.Ct. 582 (1927).

II

APPELLANT'S PLEA WAS IMPROPERLY ENTERED IN CONTRAVENTION OF RULE 11 OF THE F.R.Cr. P.

The Government (Br. at 13-18) offers not a scintilla of support for its contention that Rule 11 of the F.R.Cr.P. is to be applied differently to a defendant who pleads guilty under the circumstances in which the appellant pled guilty in the case currently at bar. Once again, as in the prosecution's misconstruction of Rule 32(d) of the F.R.-Cr.P., the Government attempts to interpose a post-trial and pre-trial standard where, in terms of Rule 11, no distinction *at all* exists. In point of fact, when one becomes familiar with the facts of *United States v. Journet* [—— F.2d.——, (2d. Cir., 1976) (Slip Op 371, 11/1/76)] the applicability of that case to the facts present before the Court in this case is all the more clear. For in the *Journet* case, the defendant first made his motion to withdraw his plea of guilty *after* he had been sentenced. In terms of Rule 32(d), this would have put him under the "manifest injustice" standard, a much heavier burden than the appellant in this case bears. However, this Court in requiring strict compliance with Rule 11, spoke resoundingly in declaring that a failure to comply with the mandates of Rule 11 would be such a manifest injustice. Where, as here, the appellant need only show a "fair and just reason" for withdrawing his plea, it would seem that the *Journet* case makes the violation of Rule 11 all the more telling.

The Court's holding in *Journet* is clear and unmistakeable:

> "We hold that unless the defendant is specifically informed of *each and every element* enumerated in Rule 11, the plea must be vacated.
>
> * * *

> "We now hold that, *as a minimum*, before accepting a guilty plea each district judge must personally inform the defendant of *each and every* right and other matters set out in Rule 11. *Otherwise, the plea must be treated as a nullity.*" Slip Op at 377, 373 (Emphasis supplied)*

Any attempt at arguing that no prejudice resulted in the failure to advise specifically of the protections of Rule 11 must be defeated under the reasoning of *Journet*. Any departure from Rule 11 may no longer be viewed as non-prejudicial.

> "To permit Rule 52(a) [harmless error] to be used as a means of by-passing the specific and detailed procedure prescribed by Rule 11 would be to frustrate and defeat Congress's expressed intention." Slip Op at 377.

In sum and substance therefore, even without reaching the question of whether there was a factual basis for the plea** involved, strict compliance with Rule 11 was not forthcoming. Vacation of the plea is therefore mandated under the Rule.

> "[T]he language of the old Rule, which was general in nature, did not necessarily require the Court to enumerate each and every right waived by the pleader as long as the record, viewed in the totality of the surrounding circumstances, demonstrated that the defendant was 'sufficiently aware of the

---

* The Government notes (Br. at 14, footnote) that "Michaelson correctly points out that the District Court did not specifically advise him of his right not to be compelled to incriminate himself and of the fact that if his allocution were conducted under oath, on the record in the presence of counsel, Michaelson's statements could be used against him in a prosecution for perjury or false statement." This Court, however, recognized no requirement of prejudice as the Government implies it did in the sentence following the quoted material. Under *Journet, supra* no prejudice need be shown.

** Appellant's main brief points out the clear defense the defendant maintained—even at the plea.

> consequences of and alternatives to his guilty plea to render his plea a voluntary and intelligent one'
>
> * * *
>
> It now appears that Congress, by its recent amendment of Rule 11, has decided to *mandate* just such a course in lieu of requiring Appellate Courts to interpret the old Rule's general guidelines in a case by case basis. §(c) of the new Rule 11 provides that before accepting a guilty plea the Court 'must' personally inform the defendant in open Court of specifically enumerated rights and other matters pertaining to the question of whether the plea is a voluntary and knowing one. *It is difficult to conceive of clearer language.*" Slip Op at 375. (Emphasis supplied)

Lastly, appellant stands by his contention that the allocution by the appellant at the time of the taking of the plea was insufficient to support a factual basis as required by Rule 11(f). The Government attempts to equate "knowledge" with "action" and such a computation is neither warranted nor supported.

III

THE DISTRICT COURT BUSED ITS DISCRETION IN REFUSING TO GRANT TO APPELLANT ADDITIONAL TIME TO RESPOND TO THE PRE-SENTENCING REPORT.

The Government has not refuted the contention forwarded in appellant's brief that the Court below had specifically promised at the time of the sentencing that, if counsel found material in the pre-sentencing report with which he disagreed and which needed further investigation, additional time would be granted. (A-24). Moreover, under the terms of the District Court's agreement to provide

additional time, there was no need for the appellant to "mention any inaccuracy in the pre-sentence report". (Br. at 19, footnote *). The need for further investigation should have triggered the assurance of the trial court judge. Also unrefuted, is the fact that when this request was made on November 18, 1976, in a letter to Judge Duffy, the additional time was not forthcoming and appellant was forced to sentence unprepared. Appellant would take issue with the description of *United States v. Robin*, [——F.2d—— (2d Cir., 1976) (Slip Op. No. 5829, 10/15/76)] as "radically different" from the facts in this case. It is true that in *Robin* no trial took place prior to the sentencing of defendant, this is not at all dissimilar to the situation in which appellant found himself, one in which a trial takes place but the person who will be affected by its findings of fact is not a participant thereto. Appellant posits that this is a distinction without a difference. Further, appellant here raises "specific claims of allegations in the pre-sentence report that he disputed." (Br. at 19, footnote *) Appellant here disputes his guilt as well as his characterization as the "most culpable" of his co-conspirators.

From the entire discussion in this response, it is so apparent that an evidentiary hearing should have been held in this case that extended discussion of the issue will not be made. It appears that the Court below made its determination not to allow the withdrawal of the plea of guilty upon a truncated trial in which the defense side put in no case whatsoever and made a decision as to *Brady* material without ever discerning what that material was:

> "The Rule is that when, as here, an effort is made to withdraw a guilty plea before sentence the defendant is entitled to an appropriate hearing before the application can be denied." *U.S. v. Joslin*, 434 F.2d 526, 531 (D.C. Cir., 1970).

CONCLUSION

Appellant's plea of guilty should be vacated and his case remanded for a trial.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Jan. ,19 77 at No. 1.St. Andrews Pl., NYC

deponent servied the within Reply Brief
upon U.S. Atty. So. Dist. of N.Y.

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
24 day of Jan. 1977.

Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978